SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 181

GEORGE SLATER,

Petitioner,

against

MARK E. STOFFEL, ADMINISTRATOR OF THE ESTATE OF BERNARD J. STOFFEL, DECEASED, AND THE COMMUNITY STATE BANK, HUNTINGTON, INDIANA, ADMINISTRATOR OF THE ESTATE OF DONALD H. STOFFEL, DECEASED,

Respondents.

ROBERT SLATER, BY GEORGE SLATER, HIS FATHER, AS NEXT FRIEND,

Petitioner,

against

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO JOINT PETITION FOR A WRIT OF CERTIORARI.

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against

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RESPONDENTS' BRIEF IN OPPOSITION TO JOINT PETITION FOR A WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the United States District Court for the Northern District of Indiana, which was reversed by the United States Court of Appeals for the Seventh Circuit, is reported in 206 F. Supp. 534 (N. D. Ind., 1962).

STATEMENT OF THE CASE.

In its decision rendered February 8, 1963, which Petitioners have asked this Court to review, the United States Court of Appeals for the Seventh Circuit held that Petitioners, plaintiffs in the District Court, could not maintain an action against Respondents, defendants in the District Court and personal representatives of the estates of two decedents, for recovery of damages for personal injuries sustained in a motor vehicle accident which occurred in Huntington County, Indiana, on June 6, 1959, without complying with the Indiana "Survival Statute", § 2-403, Burns' Ind. Stats. (1962 Cum. Supp.) (Joint Petition for a Writ of Certiorari, App. "B", pp. 23-24), which provides:

> "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party * * * *in event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as otherclaims against said decedent's estate*" (Emphasis added);

and §§ 7-801(a), 7-802, Burns' Ind. Stat. (1953 Repl. Ed.) (Joint Petition for a Writ of Certiorari, App. "B", pp. 24-25), governing the prosecution of claims against decedents' estates, which provide:

> "(a) All claims against a decedent's estate, other than expense of administration and claims of the United States, and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, *shall be forever barred* against the estate, the personal representative, the heirs, devisees and legatees of the decedent, *unless filed with court in which such estate is being administered within six (6) months after the date of the first published notice to creditors.*" (Emphasis added.)

> "*No action shall be brought by complaint and summons* against the personal representative of an estate for the recovery of *any claim* against the decedent, or his estate, but the holder thereof, whether such claim be due or not, *shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending*; * * * the statement shall set forth all credits and deductions to which the estate is entitled and *shall be accompanied by the affidavit of the claimant, his agent or attorney*, that the claim, after deducting all credits, set-offs and deductions to which the estate is entitled, is justly due and wholly unpaid, or if not yet due, when it will or may become due, and *no claim shall be received unless accompanied by such affidavit*: * * *." (Emphasis added.)

Respondents' decedents were killed in said motor vehicle accident, and Petitioners subsequently filed suit against Respondents, in the District Court, as personal representatives of the estates. It is admitted that any right of action which Petitioners may have must depend on the "Survival Statute", § 2-403, Burns' Ind. Stats. (1962 Cum. Supp.), which provides the sole basis of the state-created right which petitioners have attempted to invoke.

It is also admitted that neither Petitioner filed a succinct and definite statement of his claim, together with the affidavit required by § 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), with the Clerk of the Huntington Circuit Court of Huntington County, Indiana—the court wherein the administration of the estates of Respondents' decedents is pending—within six months after the first published notice to creditors of said estates, as required by §§ 7-801(a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.).

In their answers filed in the District Court (Item 18 of Record, pp. 51-70; App., pp. 14-28), Respondents set out affirmatively that Petitioners had failed to comply with the provisions of the aforesaid statutes, alleging that said

statutes established conditions precedent to the enforcement of claims against decedents' estates with which Petitioners were bound to comply, and that Petitioners therefore had no standing to maintain the actions; that the District Court lacked jurisdiction of the subject matter of the actions because jurisdiction of claims against decedents' estates was vested in the Huntington Circuit Court by reason of said statutes; that Petitioners were attempting to prosecute their actions directly against Respondents, by complaint and summons, contrary to the public policy of the State of Indiana as declared by said statutes; and that Petitioners' actions were barred because of failure to comply with the requirements of said statutes within six months after the first published notice to creditors of the estates.

On Petitioners' motion (Item 21 of Record, p. 74; App., p. 29), the District Court ordered all of said defenses stricken from Respondents' answers, holding that they were insufficient as a matter of law, but recognizing that its order involved a controlling question of law as to which there was substantial ground for difference of opinion, and that an immediate appeal from the order might materially advance the ultimate termination of the litigation. (Item 26 of Record, pp. 100-107; App., pp. 30-38; 206 F. Supp. 534.)

Respondents thereupon applied to the United States Court of Appeals for the Seventh Circuit for interlocutory appeals from said order pursuant to 28 U.S.C.A., § 1292. (Item 28 of Record, pp. 110-120; App., pp. 38-47.) The appeals were allowed (Item 30 of Record, p. 142; App., p. 53), and the Circuit Court of Appeals reversed the District Court, holding that the District Court could not substantially affect the enforcement of the state-created right made available by the Indiana "Survival Statute", by dispensing with the aforesaid statutory requirements on

which the exercise of the right is conditioned, and that Petitioners had no standing to maintain the actions in the District Court in view of their failure to comply with said requirements. (Joint Petition for a Writ of Certiorari, App. "A", pp. 15-22; 313 F. 2d 175 (C.A. 7th, 1963.)

In their Joint Petition for a Writ of Certiorari, Petitioners ask this Court to review the decision of the United States Court of Appeals for the Seventh Circuit on the ground that said Court, in making its decision, "departed from the usual and accepted course of judicial proceedings." (Joint Petition for a Writ of Certiorari, pp. 3-4.)

ARGUMENT.

I. Petitioners' Actions in District Court Founded on a State-Created Right.

At the outset, it should be emphasized that we are here dealing with a right which owes its existence to the law of the State of Indiana, not to any law of the United States.

The diversity statute under which Petitioners' actions were filed in the District Court (Joint Petition for a Writ of Certiorari, p. 8), being 28 U.S.C.A. (1961 Cum. Supp.), § 1332, does not create any right of action in Petitioners. *Paterlini* v. *Memorial Hospital Ass'n., Pa.*, 247 F. 639, 643 (C.A. 3rd, 1918), cert. den. 246 U.S. 665, 38 S. Ct. 334, 62 L. Ed. 929 (1918). Rather, the sole source of any right of action which Petitioners may have been in a position to assert must be found in the Indiana "Survival Statute", § 2-403, Burns' Ind. Stats. (1962 Cum. Supp.) (Joint Petition for a Writ of Certiorari, App. "B", pp. 23-24), which provides for the survival of actions against a decedent and requires that actions brought subsequent to the death of a decedent "shall be prosecuted as other claims against said decedent's estate."

It is well-established that the right thus created is a state-created right, and that were it not for the Indiana "Survival Statute", no right of action would exist by which a nonresident plaintiff could make a claim for damages for personal injuries against the personal representative of a deceased tort-feasor. *Woods* v. *Klobuchar*, 257 F. 2d 313 (C.A. 7th, 1958), at p. 315.

II. Petitioners' Exercise of State-Created Right Dependent on Compliance With Conditions Established by the Indiana Probate Code.

Exercise of the state-created right made available by the Indiana "Survival Statute" is not unconditional.

On the contrary, its exercise is expressly conditioned on compliance by the claimant with certain provisions of the Indiana Probate Code, governing the prosecution of claims against decedents' estates, which require that the claimant shall file "succinct and definite statement" of his claim, accompanied by a special affidavit of the claimant, his agent or attorney, "in the office of the clerk of the court in which the estate is pending." §§ 7-801(a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.) (Joint Petition for a Writ of Certiorari, App. "B", pp. 24-25.) Any claim not so filed within six months after the date of the first published notice to creditors of the estate "shall be forever barred." § 7-801(a), Burns' Ind. Stats. (1953 Repl. Ed.), *supra*. (Joint Petition for a Writ of Certiorari, App. "B", p. 24.)

In many cases, Indiana courts have held that said statutory conditions are not merely conditions of limitation, affecting the remedy, but that they constitute the denial of a right of action and impose *conditions precedent* on the enforcement of the right. As held in *Otolski* v. *Nowicki*, 129 Ind. App. 588, 158 N. E. 2d 296 (1958):

> "* * * A statute of this type has been referred to as not being a statute limiting the remedy or, in other words, a statute of limitation, but as *a statute constituting the denial of a right of action and imposing a condition precedent to the enforcement of such right*. * * *" (p. 298, N. E. Rep.) (Emphasis added.)

In the recent case of *Donella, Admrx. et al.* v. *Crady*, 185 N. E. 2d 623 (Ind. App., 1962), the same Court, in holding that the time period prescribed by said statutes cannot be

extended by consent, waiver, estoppel, or even by fraud on the part of an attorney, emphasized the "built-in" nature of the aforesaid conditions, declaring:

> "The foregoing type of statute is commonly known as a nonclaim statute. It grants to every person having a claim of any kind or character against a decedent's estate, the right to file the same in the court having jurisdiction thereof and have the same adjudicated, provided such claim is filed within the time specified in the statute. Unless such claim is filed within the time so allowed by the statute, it is forever barred. *The time element is a built-in condition of said statute and is of the essence of the right of action. Unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.*" (p. 624, N. E. Rep.) (Emphasis added.)

To the same effect are *Bahr et al.* v. *Zahm et al.*, 219 Ind. 297, 37 N. E. 2d 942 (1941), at p. 944; *Lewis* v. *Smith, et al.*, 130 Ind. App. 390, 162 N. E. 2d 457 (1959), at p. 458; and *Russell* v. *Moore et al.*, 130 Ind. App. 351, 164 N. E. 2d 670 (1960), at p. 673.

Indeed, § 8-403, Burns' Ind. Stats. (1962 Cum. Supp.), constitutes an offer of an action on condition that it be commenced in the manner and within the time prescribed; the offer is not accepted in the *only way* that it can be accepted, to-wit, by complying with the conditions precedent specified in §§ 7-801(a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), "the action and the right of action no longer exist, and the defendant is exempt from liability." See *Wilson* v. *Betz Corporation*, 130 Ind. App. 83, 159 N. E. 2d 402 (1959), at p. 408.

III. District Court Could Not Substantially Affect Enforcement of State-Created Right, Place Petitioners in a Position Different From That of a Resident Creditor, or Sanction a Violation of Public Policy of State of Indiana.

This being the case, how can Petitioners in good conscience contend that the Court of Appeals "departed from the usual and accepted course of judicial proceedings" in ruling that Petitioners had no standing to maintain the actions in the District Court? Admittedly, Petitioners failed to comply with the aforesaid conditions precedent, which, under the substantive law of the State of Indiana constitute an indispensable, "built-in" part of the right which they have attempted to invoke. Under the doctrine of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938), a Federal Court is bound to respect the substantive law of a state, and may not depart from such law where the effect would be to place a nonresident litigant, in a Federal Court, in a position different from that of a resident litigant in a state court. In decisions following the *Erie* case, this Court held that a Federal Court enforcing a state-created right in a diversity action is, in substance, "*only another court of the State*," and that "*The federal court therefore may not substantially affect the enforcement of the right as given by the State*." *Guaranty Trust Co. v. York*, 326 U. S. 99, 108, 65 S. Ct. 1464, 89 L. Ed. 2079, 2086 (1945); *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U. S. 198, 76 Sup. Ct. 273, 100 L. Ed. 199, 205 (1956).

There can be no doubt that the District Court, in sustaining Petitioners' motions to strike, "substantially" affected" the enforcement of the state-created right, given by the State of Indiana under the "Survival Statute", because it eliminated the claim and affidavit requirements

prescribed by §§ 7-801(a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.)—precedent conditions on which the exercise of the right is dependent—and gave sanction to an entirely new right of action, unknown to Indiana law at the time Petitioners' cause of action accrued, and unlimited by the conditions which the General Assembly of Indiana had theretofore created. Not even Congress, let alone the Federal Courts, has constitutional authority "to make the law that is applicable to controversies in diversity of citizenship cases." *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956), at p. 204 (L. Ed.); *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Nor can there be any doubt that the District Court, in so ruling, placed Petitioners in a position different from that of a resident creditor attempting to establish his claim in a state court. It must be taken as admitted that such a creditor, seeking to establish the same claim in a state court in Indiana, would have to comply with §§ 7-801(a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), and, on it appearing that such a creditor had failed to do so, his action would have to be dismissed. *Williams* v. *Williams*, 217 Ind. 581, 29 N. E. 2d 557 (1940).

As stated in *Zuckerman* v. *McCulley*, 170 F. 2d 1015 (C. A. 8th, 1948), at p. 1018:

> "* * * It is settled law that a nonresident, seeking in a federal court to establish a claim against the estate of a decedent, is in no better or different position than a local creditor attempting to establish such a claim in the courts of the state. *The federal court is required to give full effect to the applicable state law relative to the settlement of such estates. Security Trust Co.* v. *Black River National Bank*, 187 U. S. 211, 227-231, 23 S. Ct. 52, 47 L. Ed. 147." (Emphasis added.)

It is obvious that the District Court, in ruling that Petitioners could maintain their actions notwithstanding failure to comply with the claim and affidavit requirements of §§ 7-801(a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), failed to give "full effect to the applicable state law relative to the settlement of such estates," thereby placing Petitioners in a "better or different position than a local creditor attempting to establish such a claim in the courts of the state."

It must also be taken as admitted that a resident creditor who failed to comply with the claim and affidavit requirements of §§ 7-801(a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), within six months after the first published notice to creditors of the estates, would be forever barred from prosecuting his claim in a state court in Indiana. *Donella, Admrx. et al.* v. *Cradit*, 185 N. E. 2d 623 (Ind. App., 1962); *Woods* v. *Klobuchar*, 257 F. 2d 313 (C. A. 7th, 1958). In this case, it is admitted that Petitioners failed to comply with said requirements within the period thus limited. Petitioners' actions are therefore barred under applicable Indiana law, and a Federal Court cannot entertain the actions when, at the same time, the State courts of Indiana are closed to resident creditors in the same position. To rule otherwise would be to discriminate against resident creditors by conferring a special privilege on nonresident creditors establishing their claims in Federal Courts. *Guaranty Trust Company et al.* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945), at pp. 2085-2086 (L. Ed.); *Woods* v. *Klobuchar*, 257 F. 2d 313 (C. A. 7th, 1958), at p. 315.

There are also important considerations of public policy involved in this case. At the time Petitioners' cause of action accrued, and for a period of more than two years subsequent thereto, the public policy of the State of Indiana, as declared by the General Assembly of the State and its

highest Court, was that "No action shall be brought by complaint and summons against the personal representative of an estate for the recovery of any claim against the decedent or his estate." § 7-802, Burns' Ind. Stats. (1953 Repl. Ed.)(Joint Petition for a Writ of Certiorari, App. "B", p. 24); *Williams* v. *Williams*, 217 Ind. 581, 29 N. E. 2d 557 (1940), at p. 558. In its wisdom, the General Assembly of the State of Indiana saw fit to prohibit direct actions against the personal representative, and to require a claimant against a decedent's estate to first file his claim with the clerk of the court having jurisdiction of the administration of the estate, thereby permitting the personal representative to make a litigation-free investigation of the claim, and to thereafter determine whether same should be allowed, or contested, without the delay and expense of litigation. *Williams* v. *Williams*, 217 Ind. 581, 29 N. E. 2d 557 (1940), at p. 558; *Baker* v. *Happ*, 114 Ind. App. 591, 54 N. E. 2d 123 (1944), at p. 126; *Custer* v. *Beger*, 76 Ind. App. 303, 130 N. E. 834 (1921), at p. 835; *Woods* v. *Klobuchar*, 257 F. 2d 313 (C. A. 7th, 1958), at p. 315.

In this case, Respondents were never given the opportunity to exercise this right, guaranteed to them under the law of Indiana, because Petitioners' claims were first presented in the form of lawsuits filed in the District Court, and were thereby placed in litigation from their very inception. There never was a time when Respondents were at liberty to consider these claims without the delay and expense of litigation. Petitioners' actions plunged the claims into litigation from the beginning, and stripped Respondents of their right, under §§ 7-801 (a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), to investigate the claims and determine whether they should be allowed or disallowed.

Such conduct on the part of Petitioners was clearly contrary to the public policy of the State of Indiana, as declared by the General Assembly of Indiana and the highest

Court of the State, and does violence to the legislative purpose behind the aforesaid statutes. In *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1946), this Court, in holding that plaintiff, a resident of Virginia, could not maintain an action to collect a deficiency judgment in a Federal Court in North Carolina, where such actions were prohibited by State legislation, stated that "diversity jurisdiction must follow State law and policy," and that "A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld." (p. 838, L. Ed.) Similarly, diversity jurisdiction in this case must also follow Indiana law and policy in force at the time Petitioners' cause of action accrued, and the District Court could not give to Petitioners that which Indiana has withheld.

In view of these considerations, it can hardly be said that the Court of Appeals "departed from the usual and accepted course of judicial proceedings" in holding that Petitioners should not be permitted to maintain their actions in the District Court because of failure to comply with the aforesaid statutes. Because of the nature of the right which Petitioners have attempted to invoke, the conditions upon which its exercise is dependent, the legislative purpose underlying said statutes, the public policy of the State of Indiana as declared therein and by its highest Court, and the restriction laid down by this Court on federal jurisdiction in diversity cases, the Court of Appeals could have reached no other result.

IV. Compliance With §§ 7-801(a), 7-802, Burns' Indiana Statutes, in Accordance With the Mandate of § 2-403, Burns' Indiana Statutes, Does Not Preclude a Qualified Nonresident Claimant From Having His Claim Litigated in a Federal Court.

Petitioners do not deny that their method of enforcing such state-created right, by a direct action against Respondents by complaint and summons, has had a "substantial affect" on the "enforcement of the right as given by the State." Rather, their position appears to be that such method of enforcement, and consequent disruption of state rights guaranteed to Respondents under §§ 7-801 (a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), is to be condoned because compliance with the conditions precedent, established by said statutes, would deprive Petitioners of their right to have their cases heard in a Federal Court.

However, as stated in *Woods* v. *Klobuchar*, 257 F. 2d 313 (C. A. 7th, 1958), where the Seventh Circuit Court of Appeals was called on to apply the same, identical statutes with which we are here dealing, at p. 315:

> "* * * compliance with §§ 7-801 (a) and 7-802 in accordance with the mandate of § 2-403 does not preclude a qualified non-resident claimant from having his claim litigated in the federal court upon transfer to the civil trial docket pursuant to § 7-810. * * *"

Under § 7-810, Burns' Ind. Stats. (1953 Repl. Ed.), any claim which has been disallowed by the personal representative, or which has been neither allowed nor disallowed within six months and fifteen days after the first published notice to creditors of the estate, must be transferred at once to the issue docket of the State court for trial. (Joint Petition for a Writ of Certiorari, App. "B", pp. 26-27.)

Petitioners could have filed succinct and definite statements of their claims, together with the special affidavit

required by § 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), with the Clerk of the Huntington Circuit Court within the time allowed by § 7-801 (a), Burns' Ind. Stats. (1953 Repl. Ed.), noting therein that diversity of citizenship existed between Petitioners and the personal representatives, and stating Petitioners' intention to prosecute actions in the Federal Court in the event the claims were rejected. Petitioners could have thus put the personal representatives, the Clerk of the State court, and the world on notice that the filing of their claims was without prejudice to prosecution thereof, in Federal Court, if the claims were denied. Having thus declared their intention and purpose in filing claims, Petitioners could have commenced civil actions thereon in Federal Court within the six months' period of limitations prescribed by § 7-801 (a), Burns' Ind. Stats. (1953 Repl. Ed.), and, if their claims had been disallowed, prosecuted said actions to judgment. Respondents would no doubt have been entitled to a stay of proceedings in the Federal Court until such time, within the limits prescribed by § 7-810, Burns' Ind. Stats. (1953 Repl. Ed.), as was required for them to act upon the claims. However, Petitioners' actions in the Federal Court would not have been subject to dismissal during this period, as a Federal Court will afford protection to the plaintiff, by retaining jurisdiction, pending exhaustion of an applicable State remedy. *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167, 79 S. Ct. 1025, 3 L. Ed. 2d 1152 (1959).

In this connection, it should be noted that the pendency of a proceeding, in a State court, constitutes no jurisdictional impediment to the bringing of an action *in personam* on the same claim in a Federal Court. This is true even in cases where a litigant has embarked upon active litigation in the State court. *Kline* v. *Burke Const. Co.*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226 (1922). An action to establish a claim against the estate of a decedent, as distinct

from an action brought *against property* within the custody and control of the personal representative, is an action *in personam* and not *in rem*. *United States* v. *Peoples Trust & Savings Co.* et al., 97 F. 2d 771 (C. A. 7th, 1938), at pp. 774-775. Only by pursuing his action to judgment in a State court does a litigant lose his right to prosecute a concurrent action on the same claim in a Federal Court. *Kline* v. *Burke Const. Co.*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226 (1922), at p. 230 (L. Ed.). It follows, *a fortiori*, that the filing of a claim in a State court, in compliance with conditions precedent prescribed by State law, creates no jurisdictional impediment to the filing of a civil action on the claim in a Federal Court.

Had Petitioners proceeded in this manner, Respondents' rights under the aforesaid Indiana Statutes would have been preserved, rather than emasculated, and no one could have contended that Petitioners, by such filing, had embarked on an intentional, deliberate choice of remedies precluding them from litigating their claims in the Federal Court. Contrary to Petitioners' assertions (Joint Petition for a Writ of Certiorari, p. 11), no method of removing the claims from the State court to the Federal Court would have been required. If Petitioners' claims had been filed with the Clerk of the Huntington Circuit Court, and such claims had been disallowed and further proceedings thereon attempted in said Court after transfer to the trial docket pursuant to § 7-810, Burns' Ind. Stats. (1953 Repl. Ed.), Petitioners could have simply dismissed the State court proceedings. This would not have affected their concurrent actions pending in the Federal Court. Cf. *Fast* v. *Judy*, 83 Ind. App. 85, 147 N. E. 728 (1925), at pp. 730-731.

There is nothing "mysterious" about such a procedure, as Petitioners would have the Court believe (Joint Petition for a Writ of Certiorari, p. 4), and it is well-charted

by the above authorities, which announce no principles either new or novel, and which were as readily accessible to Petitioners as anyone else.

V. Circuit Court of Appeals Did Not Ignore Prior Decisions of Judges Experienced in Indiana Law.

Petitioners further assert that the Court of Appeals departed from the usual and accepted course of judicial proceedings on the ground that it ignored the decision of Judges Swain and Treanor in *United States* v. *Peoples Trust & Savings Co.* et al., 97 F. 2d 771 (C. A. 7th, 1938), and the decision of Judge Swygert in *Hellrung* v. *Lafayette Loan & Trust Co.*, 102 F. Supp. 822 (N. D. Ind., 1951), all of said Judges being experienced in Indiana law and procedure.

These decisions were not ignored. They were cited in Petitioners' Answer Brief filed in the Court of Appeals, distinguished in Respondents' Reply Brief, and discussed extensively by counsel for Petitioners and Respondents in oral arguments heard before the Court of Appeals on January 22, 1963. The *Peoples Trust & Savings Co.* Case was decided June 6, 1938. This was only *forty-one days* after the decision of this Court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed 1188 (1938); and, the *Peoples Trust & Savings Co.* Case does not even cite the *Erie* Case, let alone consider the application of its rule to a problem of the instant type. Any case which does not consider the problem here presented in the context of the *Erie* Doctrine can hardly be regarded as controlling.

Moreover, neither the *Peoples Trust & Savings Co.* Case nor the *Hellrung* Case involved any right created under the law of the State of Indiana. The former case involved a *federally-created right*, to-wit, a claim against the per-

sonal representative of an estate for income taxes owed by the decedent. The Court of Appeals in that case did not even consider the conditions precedent established by the Indiana Probate Code, which are expressly incorporated into the *state-created right* made available under the Indiana "Survival Statute", for the obvious reason that such conditions had no application to the federal claim for delinquent taxes asserted by the United States. In the *Hellrung* Case, Judge Swygert expressly held that the Indiana "Survival Statute" had no application because the accident in that case occurred in Illinois, not Indiana, observing that "the acts of which the plaintiffs complain occurred in Illinois, and consequently the respective causes of action survived the death of the defendants intestate, if at all, only by virtue of the law of Illinois"; and that "it is apparent that Indiana does not attempt to apply the provisions of its survival statute to causes of action arising in sister states." 102 F. Supp. 822 (N. D. Ind., 1951), at p. 823.

Also, the *Hellrung* Case, like the *Peoples Trust & Savings Co.* Case, does not cite the *Erie* Case or attempt to apply its rule.

Respondents would respectfully point out that Judge Parkinson, who wrote the opinion of the Court of Appeals in *Woods* v. *Klobuchar*, 257 F. 2d 313 (C. A. 7th, 1958), which holds that a nonresident claimant must comply with §§ 7-801 (a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), before he may have his case tried in a Federal Court, and that compliance therewith "does not preclude a qualified nonresident claimant from having his claim litigated in the federal court upon transfer to the civil trial docket pursuant to § 7-810" (p. 315), was a judge of vast experience in Indiana law and procedure, having served for sixteen years as Judge of the Tippecanoe Circuit Court, Lafayette, Indiana, as is Chief Judge John S. Hastings

who concurred with Judge Parkinson and Judge Duffy in the opinion rendered in that case.

Respondents admit that the rule of *Woods* v. *Klobuchar*, *supra*, applied by the Court of Appeals in this case, requires that a nonresident plaintiff commence his civil action in Federal Court within six months after the date of the first published notice to creditors of the estate, as contended by Petitioners. However, the rule of the case extends beyond this principle, and requires that such a claimant make a timely compliance with §§ 7-801 (a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), before he is entitled to have his claim litigated in Federal Court. In the opinion in that case, Judge Parkinson gave extensive consideration to *both* § 7-801 (a), the "time" statute, and § 7-802, the "claim" statute, emphasizing in particular the legislative purpose behind § 7-802, and pointing out that compliance with its provisions does not jeopardize a nonresident claimant's right to have his case heard in Federal Court. This portion of the opinion is not *dictum*. It is an essential part of the Court's holding.

It cannot be said, therefore, that the Court of Appeals "overruled one of its own decisions directly in point, namely, *United States* v. *Peoples Trust & Savings Co. of Fort Wayne, Indiana*, 97 F. 2d 771 (C. C. A. 7th, 1938)," or that it "ignored" decisions of judges experienced in Indiana law and procedure, as contended by Petitioners. (Joint Petition for a Writ of Certiorari, pp. 3, 4.) On the contrary, it gave due consideration to, and did not overrule, the *Peoples Trust & Savings Co.* Case, which is not even in point because it involved no state-created right, and relied on *Woods* v. *Klobuchar*, *supra*, which not only involved the same state-created right we are here considering, but was decided by judges with vast experience in Indiana law.

VI. §§ 7-801(a), 7-802, Burns' Indiana Statutes, Do Establish Conditions Precedent.

Without citing authority, Petitioners argue that §§ 7-801 (a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), do not establish "conditions precedent" to filing suit, but deny to prospective litigants any right of recourse to the courts other than processing their claims in the State Probate Court. (Joint Petition for a Writ of Certiorari, p. 9.) As noted above, however, the Indiana Supreme and Appellate Courts have held on many occasions that said statutes do establish "conditions precedent" to the enforcement of *any* claim against a decedent's estate, and, the Seventh Circuit Court of Appeals has held that compliance with these conditions does not preclude a qualified nonresident from having his claim litigated in the Federal Court. *Woods* v. *Klobuchar*, 257 F. 2d 313 (C. A. 7th, 1958).

VII. Actions Brought to Establish Claims, as Distinguished From Actions Brought Against Property of a Decedent, Are Not in Rem.

Citing § 7-102, Burns' Ind. Stats. (1953 Repl. Ed.) (Joint Petition for a Writ of Certiorari, App. "B", p. 26), Petitioners argue that an action brought to establish a claim against a decident's estate is an action *in rem*, and that they could not have filed their claims with the Clerk of the Huntington Circuit Court, the Court having control of the "res" of which the estates are composed, without conferring "prior and hence exclusive jurisdiction" on that Court to the exclusion of all others. (Joint Petition for a Writ of Certiorari, p. 11.)

This argument, which was not raised or alluded to in Petitioners' Brief filed in the Court of Appeals, contradicts the rule of the principal case on which they rely, *United*

States v. *Peoples Trust & Savings Co. et al.*, 97 F. 2d 771 (C. A. 7th, 1938), where the Court of Appeals held that actions brought to establish claims against the estate of a decedent, as distinguished from actions brought *against property* within the custody and control of the personal representative, are not "in rem" and do not interfere with the "res", quoting with approval the following language, at pp. 774-775:

> "'The trust here involved was created by the Bank's voluntary action, not by the orphan's court. Whatever control the latter possessed resulted solely from appointment of the successor trustee and, for present purposes did not materially differ from that exercised by probate courts over such fiduciaries as guardians, administrators, executors, etc. The jurisdiction of federal courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interests therein. *Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution.*'
>
> "Here the only relief sought and all that could be obtained is the determination of the validity and amount of the tax claims against a decedent's estate. A judgment obtained could not in any way interfere with the orderly process of administration of the estate in the State Court, or deal with the res of the estate or its orderly distribution." (Emphasis added.)

In *Conrad* v. *Gartley*, 228 F. 2d 464 (C. A. 7th, 1956), relied on by Petitioners, the proceeding brought in the State court was *against specific property* and *in rem*. A proceeding brought to establish a claim, which seeks only a personal judgment enforceable against a decedent's estate, and which does not deal "either actually or potentially with specific property or objects," is *in personam* and not *in rem*, and "there is no objection to a subsequent action

in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined." *Kline* v. *Burke Const. Co.*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226 (1922), at p. 231 (U. S. Rep.); *Conrad* v. *Gartley*, 238 F. 2d 464 (C. A. 7th, 1956), at p. 466.

In any event, Petitioners are in no position to raise this point in their Joint Petition for a Writ of Certiorari, having wholly failed to cover or allude to same in their Brief filed in the Court of Appeals. 14 C. J. S., *Certiorari*, § 149 (1939 Ed.), at pp. 286-287.

VIII. Requirements of §§ 7-801(a), 7-802, Burns' Indiana Statutes, Cannot Be Waived.

The final point made in the "Argument" portion of the Joint Petition for a Writ of Certiorari, which is another point not raised or alluded to in Petitioners' Brief filed in the Court of Appeals, is that Respondents waived the affirmative defenses made available by Petitioners' failure to comply with §§ 7-801 (a), 7-802, Burns' Ind. Stats. (1953 Repl. Ed.), because they obtained additional time in which to file their responsive pleadings in the District Court. Needless to say, Petitioners cite no authority in support of this proposition. Moreover, as noted heretofore, the Appellate Court of Indiana has recently held that the defenses made available upon a claimant's failure to comply with these statutes are not subject to waiver or estoppel, and cannot even be lost by fraud or misconduct. *Donella* v. *Crady*, 183 N. E. 2d 623 (Ind. App., 1962), at pp. 624-625.

This being the case, it is impossible to see how Respondents could have waived such defenses by obtaining additional time, consented to by Petitioners, in which to file responsive pleadings.

CONCLUSION.

Petitioners have failed to show that the Court of Appeals departed from the usual and accepted course of judicial proceedings in any respect, and their Joint Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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